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Ruby L. Kasper and David Kasper v. Jennifer Nordfelt : Brief of Appellant

Utah Court of Appeals

Michael J. Petro; Young & Kester; Attorney for Appellant.
David M. McConkie; Kirton, McConkie & Poelman; Attorney for Appellee.

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IN THE UTAH COURT OF APPEALS

RUBY L. KASPER and DAVID KASPER,	)	
Plaintiff and Appellant	)	
vs.	)	Case No. 900290-CA
JENNIFER NORFELT,	)	
Defendant and Appellee	)	

BRIEF OF THE PLAINTIFF/APPELLANT

Appeal from the Fourth District Court
Utah County, State of Utah, Judge Cullen Y. Christensen
Argument Priority Classification 4

David M. McConkie
KIRTON, McCONKIE & POELMAN
Attorney for Defendant/Appellee
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, UT 84111
(801) 328-3600

Michael J. Petro
YOUNG & KESTER
Attorney for Plaintiff/
Appellant
101 East 200 South
Springville, UT 84663
(801) 489-3294

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JURISDICTION

Jurisdiction is conferred upon the Utah Court of Appeals pursuant to U.C.A. 78-2a-3(2)(h) (Supp. 1990).

NATURE OF PROCEEDING

This appeal is based upon an order entered by the honorable Cullen Y. Christensen, Judge, Fourth Judicial District Court, Utah County, State of Utah, dismissing plaintiff/appellants complaint.

STATEMENT OF THE ISSUES

I. Whether plaintiffs/appellants have a recognizable interest in defendant's/appellee's child to permit intervention for adoption proceedings or grandparent visitation rights.

I. Whether defendant's child was at any time parentless.

DETERMINATIVE STATUTE

Utah Code Annotated §78-30-4(1)(2) (Set fort in its entirety in the Addendum)

STATEMENT OF THE CASE

On September 26, 1989, the appellee gave birth to a baby girl. (R. at 103). The father of the child is David V. Kasper, son of plaintiff/appellants. On June 17, 1989, David

V. Kasper, the father of the child, was killed in an automobile accident. David V. Kasper and appellee were not married at the time of his death. However, wedding announcements were had been printed prior to David V. Kasper's death. On or about September 26, 1989, appellant filed a complaint with the Fourth Judicial District Court, Utah County, requesting grandparental rights. (R. at 1). On September 27, 1989, appellee executed an affidavit and release, relinquishing her child to L.D.S. Social Services, a licensed child placement agency, for adoptive placement. The child has since been placed by L.D.S. Social Services in an adoptive home. (R. at 103) Appellee filed a motion to dismiss on or about October 10, 1989. (R. at 6). Both parties submitted memoranda of points and authorities and upon entertaining oral arguments, Judge Cullen Y. Christensen took the matter under advisement and orally requested further research and memoranda on the issue of whether or not the subject child was ever "parentless." (R. at 80). Having considered the memoranda and matters outside the pleadings, and pursuant to Rules 12(b) and 56 of the Utah Rules of Civil Procedure, Judge Christensen granted appellee's motion and dismissed the case with prejudice on May 8, 1990, (R. at 106) stating that the child was at no time parentless. (R. at 104). The appellant's, Ruby L. Kasper and David Kasper, appeal from the decision of the trial court.

SUMMARY OF THE ARGUMENT

The trial court erred in granting defendant's motion to dismiss the complaint by basing its decision on one very narrow issue: whether the child was at any time parentless. Plaintiff/appellant believes that the child was at one time parentless. Defendant gave up all rights, duties and privileges to her child. She signed an affidavit terminating all of her rights and privileges for the said child and the child was relinquished to a child placement agency.

When cases such as the case at hand arise involving the future of a child, the trial court should consider both equity and points of law in making its decision. In this case, it appears that the Court did not take into consideration one very important fact: that appellants are the grandparents of the subject child. This one important fact guarantees appellant at the minimum an interest in the custody and welfare of child or an inchoate right in the custody and welfare of the child. The trial court completely ignored this right and interest that grandparents have and dismissed the case. This case should not have been dismissed and appellant's should have been granted a hearing on their fitness as potential adoptive parents.

DETAIL OF THE ARGUMENT

Appellants believe that the trial court erred in granting defendant's Motion to Dismiss the complaint. The Court failed to recognize the most important fact of the

case, which is that the plaintiffs/appellants are the grandparents of the subject child of this matter. Appellant's believe that according to Utah statutes, case law and since the trial court recognized that appellants are the grandparents of the child, that appellants do have a right to a hearing regarding their fitness as adoptive parents, or at least whether they may exercise visitation rights with the child.

A. APPELLANTS SHOULD BE GRANTED THE RIGHT TO A HEARING BASED ON UTAH CASE LAW AND THE UNUSUAL FACTS IN THIS CASE.

According to the record in this case, the trial court recognized that appellants are the grandparents of the child born to appellee. However, the trial court failed to recognize any right that appellants have regarding their grandchild. This is contrary to established Utah case law on the issue of grandparental rights. In Wilson v. Family Services Div., Region Two, 554 P.2d 227 (Utah 1976), the Supreme Court stated that grandparents do have an interest and a right in the custody and welfare of their grandchild under certain circumstances. Specifically, a grandparent has a "dormant" or "inchoate right or interest" in the welfare or custody of a child who becomes "parentless." See also, State In Interest of Tom, 556 P.2d 213 (Utah 1976); State in Interest of Summers v. Wulffenstein, 571 P.2d 1319 (Utah 1977); K.O. v. Denison, 748 P.2d 588 (Utah App. 1988). If a child is considered parentless then the grandparents may

exercise their right and assert their claim. Wilson at 231. However, contrary to Wilson, the Trial Court stated that the child was never parentless at any time and appellant's claim was dismissed.

The Court's decision appears to be based solely on Wilson. In Wilson the mother of the subject child was before the court on charges of neglect. During the proceedings, the *mother* "agreed to surrender and disclaim all rights" to the child. The court did not terminate or sever the mother's rights but ~~father~~ ***she voluntarily*** gave up her rights to the child. The court then placed the child with Family Services for adoption. The mother's rights were never severed by the court and the child was deemed by the Wilson court to be parentless. Appellants believe that Wilson is very similar to the case at hand. In Wilson and in this case, the rights to the child were voluntarily terminated. However, the trial court in the instant action distinguishes this case from Wilson. The Court failed to give any reason or basis for its decision of not deeming the child parentless other than the Wilson case. The appellants believe that since appellee gave up all rights to the custody of the child by signing an affidavit releasing her rights, that the child was in fact parentless while it was in the custody of the child placing agency.

By any definition of the word "parent", a child placement agency could not be considered a "parent." An agency's purpose is to place children with adoptive parents.

In other words, the agency is to find suitable adoptive parents for a child, not to be the parent itself. The agency is not a substitute, surrogate or any other artificial parent, but is rather a weigh station between the time the child is with its natural parent and the time the child is placed with an adoptive parent. This appears to be the case whether the parents rights were voluntarily or involuntarily terminated, and/or the agency is a private or state funded agency. In State In Interest of Summers v. Wulffenstein the court referring to Wilson stated that "the administrative agency should give serious consideration to the grandparent's claim, and that failing, the court concerned with the welfare of the child, should accord the grandparent a hearing and determination on the merits of the petition." State In Interest of Summers v. Wulffenstein at 1322.

Appellants are sympathetic to the appellee's wishes to forget a painful time in her life. However, the thought of losing their grandchild to an unknown couple and never being a part of their grandchild's life is equally if not more painful to them. As much as appellee wishes to control the future of her child, by law, the natural parent and the agency have no legal right to grant custody. Id. The granting of custody is a judicial proceeding in which, if an agency is involved, must consent to. U.C.A. §78-30-4(1)(2). It must be noted that once a child is placed with an agency and the parents, if living, voluntarily release their rights of custody and welfare in the child, then the parents are not

required to consent to the adoption. The decision of choosing an adoptive family is then the responsibility of the agency. Appellants believe that the wishes of the natural parent as to who the child is placed with are relevant only to any relationship between the the agency and the natural parent. The wishes of the natural parent are irrelevant in terms of the rights of others, specifically the grandparents, and those who actually get custody of the child.

B. WHEN A PARENT RELEASES CONTROL OF THE CHILD TO AN ADOPTION AGENCY, THE PARENT LOSES ALL OF HIS/HER RIGHTS IN THE CHILD

Utah Code Ann. §78-30-4(1) states in relevant part:

> A child cannot be adopted without the consent of each living parent having rights in relation to said child, except . . . whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, released his or her or their control, custody, and all parental rights and interests in such child to any agency licensed or authorized by statute to receive children for placement or adoption in any state pursuant to that state's laws and said agency has in turn, in writing, released its control and custody of such child to any agency licensed under Chapter 8a Title 55, or to any person, or persons, selected by that agency licensed under Utah law, as adoptive parents for said child, and such Utah agency consents, in writing, to such adoption. (emphasis added.)

Utah Code Ann. §78-30-4(2) further states:

> A minor parent shall have the power to consent to the adoption of such parent's child, and a minor parent shall have the power to release such parent's control or custody of such parent's child to any agency licensed to receive children for placement or adoption under Chapter 8 [Chapter 8a], Title 55, and, such a consent or release so executed shall b e valid and have the same force and effect as a consent or release executed by an adult

parent. A minor parent, having so executed a release or consent, cannot revoke the same upon such parent's attaining the age of majority. (emphasis added.)

It appears from the language of the above statutes that when a parent, whether a minor or not, releases the child for adoption through an approved adoption agency, that parent's control custody and rights to the child are terminated when the parent releases the child and the agency accepts the child to be placed for adoption, not when the child is actually adopted. Appellants believe that the adoption does not have to take place for the parental rights of the consenting parent to be terminated. From the language of the statute it appears that once the parent releases the child to an agency the parent cannot revoke the release and have the child returned to him or her. In other words, a voluntary release of custody and parental rights has the same legal effect as the court severing parental rights. It is thereby the duty of the agency to consent to the adoption, when the adoption takes place, not the right or duty of the parents to consent. It is not disputed that appellee properly released the child to a licensed child placing and adoption agency. It is also not disputed that the said agency received and consented to the release of the child. Therefore, under Utah Code Ann. §§ 78-30-4 (1), (2) it appears that appellee had all rights terminated when she properly released the child to the adoption agency and when the agency consented to the

release. This reasoning is consistent with Wilson and the child should be deemed parentless.

Appellant therefore believes that the decision of the trial court was arbitrary in that there is no rational basis for the child being deemed parentless.

CONCLUSION

According to the above cited Utah Statutes, case law, since appellants are in fact the grandparents of the child, and appellants believe that the child was parentless, appellants believe that they do have a right and interest in the custody and welfare of the child. Therefore, since they timely intervened into the adoption proceedings, they should be granted a hearing regarding their fitness as adoptive parents.

DATED this _____ day of November, 1990.

_____
Michael J. Petro

IN THE UTAH COURT OF APPEALS

RUBY L. KASPER and DAVID KASPER,	)	CERTIFICATE OF SERVICE
Plaintiff and Appellant	)	
vs.	)	Case No. 900290-CA
JENNIFER NORDFELT,	)	
Defendant and Appellee	)	

Michael J. Petro, attorney for Appellee, hereby certifies that he caused a true and correct copy of the BRIEF OF APPELLANT to be mailed by first class mail to: David M. McConkie, KIRTON, McCONKIE & POELMAN, 60 East South Temple, Suite 1800, Salt Lake City, UT 84111.

DATED this _____ day of _____, 1990.

_____
MICHAEL J. PETRO

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, this _____ day of _____ 1990, to: David M. McConkie, KIRTON, McCONKIE & POELMAN, 60 East South Temple, Suite 1800, Salt Lake City, UT 84111..

_____

ADDENDUM

COLLATERAL REFERENCES

Utah Law Reviews. — Comment, The Utah Supreme Court and the Utah State Constitution, 1986 Utah L. Rev. 319.

Am. Jur. 2d. — 2 Am. Jur. 2d Adoption § 10.
C.J.S. — 2 C.J.S. Adoption of Persons § 13.
Key Numbers. — Adoption ⇐ 4.

78-30-3. Adoption by married persons.

A married man, not lawfully separated from his wife, cannot adopt a child without the consent of his wife, nor can a married woman, not thus separated from her husband, adopt a child without his consent, if the spouse not consenting is capable of giving such consent.

History: R.S. 1898 & C.L. 1907, § 3; C.L. 1917, § 12; L. 1919, ch. 1, § 1; R.S. 1933 & C. 1943, 14-4-3.

COLLATERAL REFERENCES

Am. Jur. 2d. — 2 Am. Jur. 2d Adoption § 41.

C.J.S. — 2 C.J.S. Adoption of Persons § 14.
Key Numbers. — Adoption ⇐ 7.

78-30-4. Consent to adoption — Paternity claims.

(1) A child cannot be adopted without the consent of each living parent having rights in relation to said child, except that consent is not necessary from a father or mother who has been judicially deprived of the custody of the child on account of cruelty, neglect or desertion; provided, that the district court may order the adoption of any child, without notice to or consent in court of the parent or parents thereof, whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, acknowledged before any officer authorized to take acknowledgments, released his or her or their control or custody of such child to any agency licensed to receive children for placement or adoption under Chapter 8a, Title 55, and such agency consents, in writing, to such adoption or, whenever it shall appear that the parent or parents whose consent would otherwise be required have theretofore, in writing, released his or her or their control, custody, and all parental rights and interests in such child to any agency licensed or authorized by statute to receive children for placement or adoption in any state pursuant to that state's laws and said agency has in turn, in writing, released its control and custody of such child to any agency licensed under Chapter 8a, Title 55, or to any person, or persons, selected by that agency licensed under Utah law, as adoptive parents for said child, and such Utah agency consents, in writing, to such adoption.

(2) A minor parent shall have the power to consent to the adoption of such parent's child, and a minor parent shall have the power to release such parent's control or custody of such parent's child to any agency licensed to receive children for placement or adoption under Chapter 8 [Chapter 8a], Title 55, and, such a consent or release so executed shall be valid and have the same force and effect as a consent or release executed by an adult parent. A minor parent, having so executed a release or consent, cannot revoke the same upon such parent's attaining the age of majority.